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Single Bench

IN THE HON'BLE HIGH COURT OF CHHATTISGARH AT BILASPUR

CRIMINAL APPEAL NO. 741 /2004

APPELLANT (IN JAIL) : Navin Kumar Singh son of late Rajkishore Singh Rajput, aged about 36 years, resident of Phatuha, P.S. Phatuha, District Patna (Bihar)

VERSUS

RESPONDENT : State of Chhattisgarh, Through :- P.S. Akaltara, District- Janjgir-Champa (C.G.)

Filed on 3/5/04 21/9/04
by Shri Malay Kr. Dey Advocate

R. to D.R. (J) 24/9/04

CRIMINAL APPEAL U/S 374(2) OF PENAL CODE R/W SECTION 36-B OF N.D.P.S. ACT 1985.

CONVICTION SENTENCES

(4B)

A.F.R.

HIGH COURT OF CHHATTISGARH AT BILASPUR

Cr. Appeal No.741/2004

Single Bench: Hon'ble Shri Dilip Raosaheb Deshmukh, J.

Navin Kumar Singh

Versus

State of Chhattisgarh

Shri Shailendra Dubey, Counsel for the appellant.

Shri U.K.S.Chandel, P.L.for the State.

JUDGMENT

(Delivered on 17th of February 2006)

This appeal is directed against the judgment dated 31.8.2004 delivered in Special Case No.10/2004 by Smt. Anuradha Khare, Special Judge (N.D.P.S.Act), Bilaspur whereby the appellant was convicted under Section 20(b)(ii)(C) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as 'the Act') and was sentenced to rigorous imprisonment for 10 years and a fine of Rs.1 lakh and in default, to undergo additional R.I. for one year.

2. Briefly stated the prosecution case is that on 1.2.2004 on receiving secret information about the illicit possession of *ganja*, Assistant Sub-Inspector D.R.Yadav P.W.3 recorded the information vide Ex.P.1 and after sending a copy thereof to his superior proceeded to the spot with police staff and two independent witnesses i.e. Jaipal Singh P.W.1 and Ashok Kumar (not examined by the prosecution). On reaching *Budgahan* chowk, Baloda, they found the appellant carrying one blue coloured bag and a water-proof plastic bag. After giving notice under Section 50 of the Act and after recording consent of

the appellant to be searched by A.S.I. D.R.Yadav P.W.3, the two bags were searched. It was found to carry *ganja* like substance. Weighment *Panchnama* was prepared by Kunjbihari Dewangan (not examined by the prosecution) vide Ex.P.6 and it was found that the total weight of the *ganja* in the two bags was 20 kgs. It was not mentioned in Ex.P.6 as to what was the independent weight of the contents of each bag. Two samples of 25 grams each were taken from each bag and were sealed. The two bags were also sealed. The blue coloured bag was marked as 'A' and the samples taken therefrom were marked as 'A-1 & A-2'. The water-proof plastic bag was marked as 'B' and the samples taken therefrom were marked as 'B-1 & B-2'. A.S.I. D.R.Yadav P.W.3 affixed the specimen impression of seal on the seizure memo Ex.P-7 which showed that it had the impression "छ0प्र0पु0 बिलासपुर" and on top of it there was some impression which is not legible and thereafter "अकलतरा" was written. A.S.I. D.R.Yadav P.W.3 handed over the two bags and the two samples to J.L.Lakda, Station House Officer, Police Station Akaltara on 1.2.2004 but did not ensure that the Station House Officer would affix his seal on the two sealed bags as well as on the samples. An acknowledgment Ex.P.19 was obtained from Head Constable Budhram Baghel (not examined by the prosecution). On 3.2.2004 vide memo Ex.P.16 of the Superintendent of Police, Janjgir-Champa, the samples marked as 'A-1 and B-1' were sent through one Constable Shankerlal (not examined by the prosecution) to the Forensic Science Laboratory and was received on 4.2.2004. On 10.03.2004 after conducting various tests, it was opined by F.S.L. that both the packets 'A-1 & B-1' had contained *ganja*. Since the quantity alleged to have been seized from the appellant was

commercial quantity, prosecution under Section 20(b)(ii)(C) was launched against the appellant.

3. The appellant abjured the guilt, pleaded innocence and led no evidence in defence. The prosecution examined independent witness Jaipal Singh P.W.1, Patwari Sheikh Gujar P.W.2 who had prepared the spot map, A.S.I. D.R.Yadav P.W.3 and S.H.O. J.L.Lakda P.W.4 and proved the report of the F.S.L. Ex.P.18. The trial Judge relying upon the evidence led by the prosecution convicted and sentenced the appellant as aforesaid in paragraph 1.

4. Shri Shailendra Dubey, learned counsel for the appellant has argued that total non-compliance of Section 55 of the Act vitiates the prosecution since the prosecution did not lead any evidence to show that the S.H.O. of P.S. Akaltara had put his seal on the four sealed sample packets and the two sealed bags and that these articles were kept in *Malkhana* of Police Station Akaltara. The *Malkhana* register of P.S. Akaltara was also not produced and proved. The property i.e. the two sealed bags and the remaining two sealed samples i.e. 'A-2 & B-2' was not produced before the trial Court for comparison of the seals by the trial Judge. The constable who took the sample for analysis to the F.S.L. was also not examined. He further pointed that specimen impression of seal on seizure memo Ex.P.7 did not tally with the impression drawn on the report by the F.S.L. Ex.P.18. It was thus clear that the substance which was sent for analysis to the F.S.L. was not the same which was alleged to have been seized from the appellant. The learned counsel further argued that the evidence led by the prosecution did not prove that the appellant was in conscious possession of the *ganja* alleged to have been seized from him since Jaipal Singh P.W.1 had in his cross-examination para 3 clearly stated that the appellant was seen sitting on the table in the hotel of one

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Kunjbihari and one bag was kept on the table and another bag was kept below the table. Since no reliable evidence was adduced to show that the accused-appellant was seen carrying those two bags, it was not proved that the substance alleged to have been seized from the appellant was in his conscious possession. On the other hand, Shri U.K.S.Chandel, Panel Lawyer for the state argued in support of the impugned judgment, though on a comparison of the specimen impression of the seals on the seizure memo Ex.P.7 and the impression of the seal drawn by the F.S.L. on the report Ex.P.18, he could not deny that the two impressions were absolutely different.

5. Having considered the rival submissions, I have perused the record of the Special Case No.10/2004. Offence under Section 20(b)(ii)(C) of the Act involves severe punishment which shall not be less than 10 years but which may extent to 20 years and also involves a fine which shall not be less than one lakh rupees but which may extend to two lakh rupees. It is, therefore, the pious duty of the Court trying such offences to apply its judicial mind in minutely verifying whether the mandatory provisions of the Act had been complied with and whether there was any possibility that the substance examined by the F.S.L. could have been tampered with, instead of mechanically recording a conviction. Regrettably, the learned trial Judge failed in her duty.

6. The record of Special Case No.10/2004 clearly shows that at no point of time during the entire trial the two sealed bags or the samples 'A-2 & B-2' were produced before the Court so as to facilitate comparison of the seals described on the report of the F.S.L. Ex.P.18 and the seizure memo Ex.P.7. The testimony of A.S.I. D.R.Yadav in para 6 shows that he did not think it necessary to obtain any acknowledgment from Shri J.L.Lakda P.W.4 after entrusting him with

the two sealed bags and the four sealed samples as mentioned above. The Station House Officer J.L.Lakda P.W.4 had deposed in para 6 that the prosecution had not produced the copy of *Malkhana* register in this case.

7. The seizure memo Ex.P.7 shows that a specimen impression of the seal was affixed thereon by A.S.I. D.R.Yadav P.W.3. Seizure memo Ex.P-7 showed that it had the impression "ठ०प्र०पु० बिलासपुर" and on top of it there was some impression which is not legible and thereafter "अकलतरा" was written. The description of the impression of the seal found on sample packets 'A-1 & B-1' by the F.S.L. has been given in the report Ex.P.18. It shows that the seal merely contained the words "O.P. बलौदा था॰ अकलतरा". In fact, a copy of specimen impression of the seal ought to have been sent along with memo of the Superintendent of Police, Janjgir Ex.P.16 to the F.S.L. for comparison of the seals. Had it been done, the F.S.L. would have at once noticed that the seals on the samples sent for analysis were absolutely different. The impression of the seal drawn by the F.S.L. on its report Ex.P.18 leaves no room for any doubt that the substance seized from the appellant had been tampered with since the specimen impression of the seal on seizure memo Ex.P.7 and the specimen impression of seal on the samples received for analysis and drawn by the F.S.L. on its report Ex.P.18 are absolutely different.

8. Section 55 of the Act is as under:

> **"55. Police to take charge of articles seized and delivered.**—An officer-in-charge of a police station shall take charge of and keep in safe custody, pending the orders of the Magistrate, all articles seized under this Act within the local area of that police station and which may be delivered to him, and

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> shall allow any officer who may accompany such articles to the police station or who may be deputed for the purpose, to affix his seal to such articles or to take samples of and from them and all samples so taken shall also be sealed with a seal of the officer-in-charge of the police station."

A plain reading of the above provision goes to show that it ensures that the samples prepared and sealed during seizure by the concerned officer are not tampered with. It has, therefore, been provided in Section 55 that the S.H.O. shall also affix his seal to such articles or on such samples which have been taken before keeping such articles in the *Malkhana*. In this case, there is total non-compliance of Section 55 of the Act. Copy of the *Malkhana* Register was also not proved by producing the original register in Court. Not only this, the property seized was also not produced before the Court.

9. In *Jitendra and Anr. V. State of M.P.* reported in **2003 Supreme Appeals Reporter (Criminal) 902** the charas and ganja alleged to have been seized from the possession of the accused were not produced before the Court so as to connect it with the samples sent to the Forensic Science Laboratory. Neither the *Malkhana Moharrir* was examined during the trial to prove that the packets in which samples were sealed had remained in *Malkhana* from the time of their receipt to the time of their dispatch to the F.S.L. nor the material objects produced during trial. The Apex Court while allowing the appeal and quashing the conviction under Section 20 (b) of the Act, observed as under:

> "In our view, the view taken by the High Court is unsustainable. In the trial it was necessary for the prosecution to establish by cogent evidence that the alleged quantities of charas and ganja were seized from the possession of the accused. The best evidence would have been the seized materials which ought to have

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been produced during the trial and marked as material objects. There is no explanation for this failure to produce them. Mere oral evidence as to their features and production of punchanama does not discharge the heavy burden which lies on the prosecution particularly where the offence is punishable with a stringent sentence as under the NDPS, Act."

.....

"Against this background, to say that, despite the pancha witnesses having turned hostile, the non-examination of the Investigation Officer and non-production of the seized drugs, the conviction under the NDPS, Act can still be sustained, is far fetched."

In *State of Rajasthan v. Gurmail Singh* reported in I (2005) Current Criminal Reports 228 (SC) where the Malkhana register was not produced before the Court to prove that the narcotic articles seized were kept in the Malkhana till they were sent to Excise Laboratory and also where no sample of seal was sent along with the sample sent to the Excise Laboratory for comparing with the seal appearing on the sample bottles, while affirming the judgment of acquittal passed by the High Court, the Apex Court held that there was no evidence to prove satisfactorily that the seals found on the samples were in fact the same seals as were put on the sample bottles immediately after seizure of the contraband.

10. In order to sustain a conviction for possession of *ganja* under Section 20(b)(ii)(C) of the Act, the prosecution is also required to establish beyond doubt that the appellant was in conscious possession of the *ganja*. In this regard, the testimony of independent witness Jaipal Singh is in variance with the testimony of D.R.Yadav, A.S.I. P.W.3. While D.R.Yadav A.S.I. P.W.3 has stated in para 3 that he had seen the appellant standing near the hotel carrying two bags, Jaipal Singh P.W.1 has in cross-examination in para 3 stated that on reaching

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the spot he saw that the appellant was seated in the hotel of Bihari and one of the bags was kept on the table in front of him and another bag was kept down below. One or two other persons were also sitting in the hotel and having snacks. This by itself is not sufficient to constitute conscious possession of the two bags by the appellant. Independent witness Ashok Kumar has not been examined by the prosecution. The F.I.R. Ex.P.13 neither shows that the appellant was seen standing with the two bags nor shows that the appellant was seated in the hotel while the two bags were placed as shown above. In cross-examination of A.S.I. D.R.Yadav P.W.3, a specific defence was raised by the accused that the *ganja* like substance which was lying in the hotel of Kunjbihari was seized and a false seizure memo in his name was prepared. Considering the testimony of Jaipal Singh P.W.1 in para 3, this possibility can also not be ruled out.

11. Having considered the evidence led by the prosecution in its entirety, the following points emerge:

(i) The prosecution did not produce the two sealed bags and the sealed samples 'A-2 & B-2' in Court;

(ii) The specimen impression of the seal on seizure memo Ex.P.7 and the impression of the seal drawn on the report of the F.S.L. Ex.P.18 did not tally;

(iii) There was total non-compliance of mandatory provision of Section 55 of the Act; and

(iv) Specimen impression of the seal used to seal the samples and the two bags were not sent to the F.S.L. for comparison.

(v) The *Malkhana* register of Police Station Akaltara was not produced to show that the seized samples and the sealed bags were kept in the *Malkhana* of Police Station, Akaltara.

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(vi) The evidence led by the prosecution did not establish beyond doubt that the seized substance was in the conscious possession of the appellant.

12. Considering the above facts, I am of the considered opinion that the conviction of the appellant under Section 20(b)(ii)(C) of the Act and the sentence awarded thereunder are liable to be set aside.

13. In the result, the appeal is allowed. Conviction of the appellant under Section 20(b)(ii)(C) of the Act and the sentence awarded thereunder are set aside. The appellant shall be set at liberty forthwith, if not required in any other case. Fine, if paid, shall be refunded to the appellant.

Sd/-
Dilip Raosaheb Deshmukh
Judge

17.02.2006